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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 41

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

E. E. BRUNER,

Respondent.

REPLY BRIEF OF PETITIONERS

P. T. FARNSWORTH, JR.,
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Counsel for Petitioners.

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CASES CITED

TEXT BOOK

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All italics are added.

REPLY BRIEF ON STATEMENT OF THE CASE

Bruner, at the time he placed himself in the position of danger, knew that movement of the engines was imminent.

On page 2 of his brief Bruner states that the movement of the engines was unexpected. This is unjustified by the

record. Bruner knew that movement of the engines was imminent. He knew that after Colosimo coaled 1149 he would descend to the cab of 1149 and then move both engines so that 1182 could be spotted at the coal apron. That Bruner did so understand is demonstrated by the fact that he was then in the act of climbing up on to the tender for the purpose of getting to the top of the tender to spot 1182 at the coal chute. The engines had to be moved in order to spot 1182. (R. 3, 33, 34, 51, 55.)

At R. 33 Bruner testified:

> Q. You told the jury before you left the cinder pit you knew you were going to take coal on both engines.
>
> A. Yes.
>
> * * * *
>
> Q. Do you recall when the engines stopped there in the vicinity of the coal chute?
>
> A. I figured that he had spotted his engine to take coal. It would be in that vinicity, yes.

At R. 34 Bruner testified:

> A. I went to the rear end of the tank. We have a ladder on the rear end of the tank, to get up on. I went to the rear end of the tank of 1182, in order to get up on the tank, to take coal, to spot for coal and to take coal.

At R. 51 Bruner testified:

> Q. He talked to you about how you would do it, that you would go to the sand house and you would sand this 1182, and then you would move down to the coal yard, and he would coal 1149, and then they would spot 1182, and you would coal 1182?
>
> A. Yes.
>
> Q. Is that correct?
>
> A. Yes.

At R. 55 Bruner testified:

Q. You say there are two aprons at the coal chute?

A. Yes.

Q. But those aprons are not sufficiently far apart so you can coal two locomotives at once?

A. No.

Q. In other words, you get one locomotive in there, and there is no room for another?

A. That is right, there is no room.

Indeed the complaint so alleges. R. 3 reads in part as follows:

> * * * That while coal was being placed in the tender of Engine No. 1149 by the said Colosimo, the plaintiff after checking the water level, steam pressure and fire of said Engine No. 1182, got down from the left hand side of the cab of said engine, went to the rear end of the tender of said engine and proceeded to climb up on the tender of said engine in order to reach a position from which he could by proper signals direct said Colosimo in the movements of said engines, *to the end that the tender of Engine No.* 1182 *could be spotted under the coal chute.*

Bruner both alleged and testified that movement of the engines was imminent at the very moment that he was climbing over the draw bars between the two engines.

Bruner's own testimony shows that, prior to the time when he reached a position on the tender where he would be visible, it was his duty to be on the south side of 1182 *so that his signals to start and stop the engines could be seen by Colosimo.*

On page 9 Bruner contends that there is no evidence that he should have stayed on the south side of the engines. Bruner himself testified at R. 28 as follows:

Q. Where would the helper be?

A. *Wherever his work was to be, he would be*

wherever he had to be to give the signals so they would be seen.

It would only be necessary to see signals when starting or stopping engines. In either event Colosimo would be in the engineer's cab. (R. 65, 73.) That is the south side. (R. 65.) Colosimo could see Bruner if Bruner were on the south side. He obviously could not see him if on the north side, unless on top of the tender. But Bruner was not on top of the tender. He dismounted to the ground on the north side of the engine where he could not be seen from the engineer's cab. (R. 73, Appendix A.)

Also Bruner states that he was to start the engines from the top of 1182. This is incorrect. He could start them from any position visible to the engineer's cab. It was only necessary for Bruner to be on top of 1182 when he spotted it. (R. 44.)

It was not necessarily Bruner's duty to be on top of 1182 *at the time the engines were ready to be moved.*

On page 6 of his brief Bruner says that it was his duty to be on the tender of 1182 when Colosimo *was ready to move;* and that it was Bruner's duty to be on top. The record does not bear out these statements.

It is true that there is evidence that it was Bruner's duty to spot 1182 at the coal chute. (R. 38, 44.) That may mean that Bruner should have been on top of the tender to spot it, but does not necessarily mean that it was Bruner's duty to be on the tender when Colosimo was ready to move. Bruner's evidence at R. 45-46 falls far short of showing that Bruner had to be on top of the tender to give a signal to back the engines. The physical facts demonstrate that he could have

been on the south side of the engines or on the ground to the south of the engines.

Bruner testified that it was his duty to be wherever he had to be to give signals so they would be seen. (R. 28.) But Colosimo, in the engineer's cab of 1149, could have seen Bruner giving signals if Bruner had been on the ground on the south side of 1182.

If Bruner, while on the ground south of the engines or on the south side of the engines, had given a signal to Colosimo to move westerly, he could have climbed to the top of the tender in time to spot 1182 before it reached the coal spout. Bruner would have to climb only a few steps while Colosimo started the engines and moved them an engine length.

Colosimo did not know that Bruner was not on the tender of 1182 *when the engines were started.*

On page 10, Bruner asserts that Colosimo, at the time he started the engines, knew that Bruner was not on the tender of 1182. This is contrary to the uncontradicted evidence. At R. 100 Colosimo testified that he did not see Bruner from the time Bruner gave him a signal at the sand dome, which was before the engines were moved to the coal chute, until after the accident. Colosimo expressly testified that he did not know where Bruner was, that he did not see Bruner but thought that Bruner was on top of the tender. (R. 100.)

The Railroad has always contended that the rules relied on by Bruner were inapplicable; the Supreme Court of Utah said it was doubtful; and there was evidence which would justify a finding that the rules respecting signals had been supplanted by specific instructions by Colosimo and acquiescence therein by Bruner, that Bruner was to stay on engine 1182 *until Colosimo had spotted it for coaling.*

On page 3 of his brief Bruner says there was no evidence or contention that the rules with respect to giving signals before starting engines did not apply to the movement of engines at the time of the accident. There has been a contention throughout this case that the rules were inapplicable. Indeed, the Supreme Court of Utah said that there was considerable doubt whether the rules were applicable. (R. 108.)

That statement is also inconsistent with the evidence that Colosimo was the boss (R. 27, 91), that Bruner understood he was to do what Colosimo told him (R. 27), that Colosimo told Bruner to stay on the engine (R. 81, 102), and that Bruner knew that movement of the engines was imminent (R. 3, 33, 34, 51, 55).

The regular way to coal engines was for Bruner, as hostler's helper, to coal both of them. (R. 45, 50.) That would have required Bruner first to spot 1149; then for Bruner to coal 1149; then for Bruner to dismount from the tender of 1149 and ascend to the top of the tender of 1182; then for Colosimo to move both engines westerly until 1182 was in position to receive coal; and then for Bruner to coal 1182. Colosimo ordered that the usual and customary method be departed from and that he would spot and coal 1149 and that Bruner would coal 1182. (R. 31, 45.)

At R. 45 Bruner testified:

> Q. *What was the custom and practice* where you were coaling two engines, both headed toward the east, where the coal was placed in the west engine first?
>
> A. Outside of where you make the stop where he did, the hostler's helper would be up there to take the coal, but when he had instructed me not to be there, *naturally I was up on the engine that he had told me to take coal on.* Otherwise, if the helper is to take coal he would be back on that engine to take the coal.

> Q. Did you have any instructions with reference to the engine you were to take coal on?
>
> A. He told me I was to take coal on Engine 1182, and he would take coal on Engine 1149, and he instructed me to take coal on 1182.

Colosimo testified in two places that as part of the same instructions, he told Bruner to stay on engine 1182 (R. 41, 102). Great emphasis is laid on the evidence elicited from Colosimo on cross examination that Colosimo meant merely that he would take care of 1149 and Bruner would take care of 1182. (R. 102.) The question asked was double.

> Q. (By Mr. Black) All you meant by that was that you would take care of 1149, and Bruner would take care of 1182?
>
> A. Yes sir.

Both parts of the question were true. Both parts could be truthfully answered in the affirmative. A technically minded witness might have analyzed the question and noted the introductory phrase, "All you meant by that." Colosimo didn't do so. Of course, what Colosimo meant was immaterial. Also, what Colosimo said he meant was not binding on the Railroad. The question was what a reasonable man would understand from spoken words. It is submitted that the jury could have found that a reasonable man could understand that Bruner was instructed to stay on 1182 until 1182 was spotted for coaling.

On page 5 of his brief Bruner says that all of Colosimo's evidence with respect to his instructions to stay on 1182 is as set forth on page 5. This is incorrect. At R. 81 appears the following:

> A. Yes, I believe so. I told him for him to sand 1182 and stay on her and coal her, and at the same time I would take care of the 1149.

This answer was considerably different from the answer as to which Mr. Black secured the favorable answer at R. 102. The latter read:

> A. I just told him to stay on the 1182. That is what I told him, just to stay on the 1182, and I would take care of the 1149.

Colosimo answered the double question by saying that all he meant by that answer at R. 102 was that Colosimo would take care of 1149 and Bruner would take care of 1182, in spite of the fact that such was far from the natural meaning of Colosimo's answer. It is to be noted, however, that the answer at R. 81 contains elements in addition to those contained in the answer at R. 102, to wit: that Colosimo told Bruner to sand 1182 and to coal 1182. Colosimo at R. 81 testified he told Bruner not only to coal 1182 but also to stay on 1182. Certainly the effect of the evidence at R. 81 was not dissipated by the cross examination at R. 102. Indeed Br. Black did not ask Colosimo what he meant by the evidence given at R. 81.

The record does not justify the statement that it was the usual, customary and proper way to climb over the wooden beam and cross over the coupler of 1182.

On page 8 of his brief Bruner states that the usual, customary and proper way to get to the top of the tender of 1182 was to climb on to the wooden beam at the rear of the tender of 1182 and thus cross over the coupler to get to the ladder. At R. 75-76 Bruner did testify that he had had occasion to, that he had done so many times, and that it was common practice. But he was pressed further by his counsel by the question:

> "Q. There is no effort at all?"

and answered:

> "A. I have had occasion to."

On pages 12-20 of their original brief petitioners have discussed the situation, the various ways of getting from the cab to the top of the tender of 1182, and the fact that the way chosen by Bruner was awkward and dangerous. The physical facts demonstrate this. It seems ridiculous to assert that it was usual, customary and proper. Evidence to that effect by a party in interest should be entitled to little if any weight. Certainly it cannot establish it as matter of law.

On pages 8 and 9 Bruner points to evidence that he could climb to the top of 1182 as he saw fit. True Bruner and Colosimo so testified. Such evidence, however, cannot prevail against the well settled principle of the law of Master and Servant that the servant's choice of ways must be reasonable, not outrageous.

The record does not show that the Railroad's Request for Instruction No. 5 was given.

On page 11 Bruner states that the Railroad's requested Instruction No. 5 was given. The record does not show it. It is true that the request is endorsed "Given." It is true that the Railroad did not except to a refusal to give it. It may, as suggested by Mr. Justice Larson, have been misled by such endorsement. (R. 116.)

At R. 116 Mr. Justice Larson states:

> * * * This requested instruction appears in the file, endorsed by the judge as "Given," *but it is not found in form or substance in the charge as read to the jury.* No exception to the failure of the court to give this Request No. 5 was taken, perhaps because when the court endorsed the request as "given," counsel assumed the court had given it.

This shows that such an instruction was not read to the jury. Moreover, it is not in the printed record before this court

although the parties stipulated that the entire charge, except the first paragraph which described the pleadings, be certified up. (R. 137.)

REPLY BRIEF ON BRUNER'S POINT I

This court will not disregard errors by State Supreme Courts unless convinced that they are harmless.

In *Yazoo & M. V. R. Co.* v. *Mullins*, cited by respondent on page 15, the court said on page 533:

> But we cannot say here that the rights of the Railroad were not prejudiced by the error of the Supreme Court of Mississippi. * * * *As examination of of this record does not convince us that the admitted error was harmless*, the judgment of the Supreme Court of Mississippi is reversed.

On page 15 Bruner states that the judgment in the above case was reversed because of clear error in an instruction. As will be noted from the above excerpt it was reversed because the court *was not convinced* that error by the Supreme Court of the State was not prejudicial.

It is difficult to see how this court can be convinced that the errors of the Supreme Court of Utah were not prejudicial.

If Instructions 6, 9 and 20 were not regarded by the Supreme Court of Utah as prejudicially erroneous, that court could most easily have disposed of the asserted errors by so stating. The fact that it did not thus dispose of the instructions, but chose the more arduous burden of examining the record and reaching a conclusion that Bruner was not guilty of contributory negligence as matter of law and that the defendants were guilty of negligence as matter of law, seems to justify the inference that the Supreme Court of Utah had grave doubts as to the instructions or thought that they were preju-

dicially erroneous. This is particularly true in view of two dissents on the very subject of whether there was evidence of contributory negligence and whether the Railroad was guilty of negligence as matter of law.

If the Supreme Court of Utah has erred in concluding that Bruner was as matter of law not guilty of contributory negligence and that the Railroad was as matter of law guilty of negligence, it has been misled by such errors into refusing to review and hold erroneous Instructions Nos. 6, 9 and 20.

This Court would usually take the view that Error or Lack of Error in Instructions such as Nos. 6, 9 and 20 are State questions which it will not review.

In *Yazoo and M. V. R. Co.* v. *Mullins* this court on page 533 said:

> * * * Whether the case comes from a state court or a federal court, this court will, for the purpose of determining whether the error found may have been prejudicial, examine the whole record; *state questions being left to the decision of the state court in cases coming here from those courts.*

In addition to the Federal Courts there are forty-eight State courts administering the Federal Employers' Liability Act. They all have their statutes, rules and decisions respecting instructions to juries, errors therein, prejudice thereby, exceptions thereto and review thereof. Those rules are applicable not merely to Federal Employers' Liability Act cases. If it clearly appears that the practice in a certain State is such that the rights of a party under the Federal Employers' Liability Act are not protected, this court would review and reverse such practice.

Garrett v. *Moore-McCormack Co.*, 317 U. S. 239, 87 L. Ed. 239, 63 S. Ct. 246

Lisenba v. *People of State of California*, 314 U. S. 219, 86 L. Ed. 166, 62 S. Ct. 280

If a State Supreme Court approved instructions to a jury which *avowedly* placed the burden of negativing contributory negligence on plaintiff or denied to defendants mitigation of damages on account of contributory negligence, this court would be likely to review and reverse. Suppose, however, that an instruction recognizes the correct principles of law but contains an element, which according to the decisions of the Supreme Court of State A constitutes prejudicial error, but according to the decisions of the Supreme Court of State B does not, will this court undertake to harmonize and reconcile such decisions by State Supreme Courts? It would seem an impossible task. It is a problem of judicial administration inherent in the Federal Employers' Liability Act being administered in State courts. Usually the court refuses to review such questions and says they are State questions.

L. & N. R. R. Co. v. *Holloway*, 246 U. S. 525, 62 L. Ed. 867, 38 S. Ct. 379

This conforms to the general rule that State courts follow their own rules of practice and procedure under the Federal Employers' Liability Act, and that this court does not interest itself unless matters nominally of procedure, are actually matters of substance which affect the Federal right.

Lee v. *Central of Georgia Railway Co.*, 252 U. S. 109, 64 L. Ed. 482, 40 S. Ct. 254

Minneapolis & St. Louis R. Co. v. *Bombolis*, 241 U. S. 211, 60 L. Ed. 961, 36 S. Ct. 595

And this, no doubt, would be true even though this court might consider that the practice in one State was better calculated properly and justly to administer the act than that of some other State.

If a State court recognizes correct principles of law under the Federal Employers' Liability Act but nevertheless instructs

the jury erroneously, the prejudiced party may always urge logically that his rights under the Act have not been protected. Thus in the case at bar, the Railroad contends that although the trial court gave Instruction No. 15 (R. 117) which told the jury that contributory negligence diminished damages proportionately, also gave Instruction No. 6 which was inconsistent with No. 15, and that, under the decisions of the Supreme Court of Utah, that is prejudicial error. If the Supreme Court of Utah had reviewed those errors, and held the errors were non-erroneous or not prejudicially erroneous, we suggest that this court would probably regard that as a state question and decline to review it.

This court, we presume, was willing to review this case, not because of the question of whether or not the instructions were erroneous, but because the Supreme Court of Utah refused to decide whether they were erroneous on the ground that there was no evidence to be submitted to the jury on the issues as to which the instructions under attack were given. Thus the State court held that the Railroad should not be accorded review of its contention that it was not accorded a fair trial of those issues, because it was not entitled to any jury trial of such issues. On page 12 Bruner calls this assertion "extravagant and misleading." It is submitted that it is based on the realities of the situation.

The ruling contended for by Bruner, that this court should avoid the question of whether the State Supreme Court erred in holding that the Railroad was as matter of law negligent and that Bruner was as matter of law not negligent by examining the instructions, would in many cases leave a litigant such as the Railroad in this case without remedy. Its case would fall between a State Court, which refuses to consider whether an instruction is erroneous because it considers that

there is no evidence on a certain issue to be submitted to a jury, and this Court, which regards the question as to whether the instructions under attack are erroneous or prejudicially erroneous as one for the State court.

REPLY BRIEF ON BRUNER'S POINT II

(a) *Reply brief regarding Instruction No. 6.*

There seems to be no substantial difference between the parties as to the meaning of Instruction No. 6. On page 35 of its original brief the Railroad described the effect of the instruction thus:

> Instruction No. 6 was clearly erroneous in telling the jury that Bruner could assume and presume and act upon such presumption that the engine would not be moved and that rules and regulations would be observed. To hold that Bruner might thus presume and act would absolve Bruner from the duty of exercising due care for his own protection. *It violates the fundamental rule* applied in every variety of negligence case *that plaintiff as well as defendant must exercise due care* and is not relieved from that duty merely because it has been disregarded by the other party.

On page 23 of his brief Bruner describes the effect as follows:

> * * * The instruction told the jury that, *as matter of law*, Respondent had a right to rely upon obedience to these standards. * * * The instruction merely states that in making the attempt to pass over the couplers and up the ladder to the top of 1182, *it was not necessary for Respondent to take precautionary measures to guard himself from danger* which could arise only as the result of Colosimo's failure to obey the rules, regulations and customs.

On page 23 Bruner contends that decisions from State and Federal courts under the Federal Employers Liability

Act "unanimously support the proposition that employees are entitled to rely upon rules and customs which determine the standard of what they must anticipate in the performance of their duties and that they are entitled to act in reliance thereon."

The cases cited do not support the contention. The first case cited, *Tennant* v. *Peoria & P. U. Ry. Co.*, decided by this court in January, 1944, is typical of many of the other cases cited and brings out the underlying fallacy of Bruner's contention. In discussing the rule and custom of ringing a bell when an engine is about to move, this court said:

> * * * In addition, the evidence relating to the rule and custom of ringing a bell "when an engine is about to move" *warranted a finding that Tennant was entitled to rely* on such a warning under these circumstances. The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. *The jury could thus find* that respondent was liable "for * * * death resulting in whole or in part from the negligence of any of the * * * employees."

This court thus held that the evidence of the rule and custom justified a finding that the employee was entitled to rely on the warning. It did not hold that Tennant could for that reason fail to exercise reasonable care for his own protection. Nor did this court hold that Tennant had the right, as matter of law, to assume and presume and act upon the presumption that a bell would be rung. It did not hold that the trial court could properly instruct the jury that Tennant would not be guilty of contributory negligence in wholly failing to exercise reasonable care for his own protection. On the

contrary this court said that all such circumstances were for the jury. On page 412 the court said:

> * * * It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.

In the second case cited, *Kurn* v. *Stanfield*, decided by the Eighth Circuit Court of Appeals in May, 1940, the plaintiff pleaded that there was a rule and custom not to start trains except on proper signal. This was admitted by the railroad. There was no issue to to that. A motion for a directed verdict was denied and a verdict for the plaintiff resulted. The railroad contended that the trainman was guilty as a matter of law failing to anticipate that the train would come upon him wihout warning. The Eighth Circuit Court of Appeals held that the employee was not as matter of law bound so to anticipate. On page 473 the court said:

> * * * Stanfield had not given the necessary signal which was the condition precedent without which his train should not have proceeded *and he was not as a matter of law bound to anticipate that it would come down upon him suddenly and without warning.*

And on page 474:

> * * * We think the evidence here required the submission to the jury and a verdict in Stanfield's favor was fully justified.

Here again it is to be noted that the court did not hold that the jury should have been instructed as matter of law that the employee would not be guilty of contributory negligence in acting upon the assumption that the rule and custom would be adhered to.

It would unduly prolong this reply brief to analyze in detail the other sixteen cases cited by Bruner for this contention. Suffice it to say that none of them holds that a plaintiff may as matter of law rely wholly on the master to comply with rules and recover regardless of a failure to exercise reasonable care for his own safety.

Many other cases might be added to those cited by Bruner which contain general statements that violations of rules or practices constitute negligence and that one has a right to "assume" that another will not be negligent and "rely" on others being careful. Under the peculiar facts in many cases, courts have held, and correctly held, that plaintiffs had the right to assume that rules, practices, city ordinances or statutes, etc., would not be violated and to act on that assumption. No court has ever announced that law and held it to be applicable where plaintiff has actual knowledge of such violation and voluntarily exposes himself to the peril incident thereto; or where plaintiff had knowledge or notice that such violation *might* occur, of such character as would cause a reasonably prudent man under all of the surrounding facts and circumstances to refrain from exposing himself to danger incident to such possible violation; or where different inferences may be drawn from the evidence as to whether a plaintiff in the exercise of reasonable care should have anticipated the possibility of a rule not being complied with by reason of special circumstances such as Colosimo's instructions to Bruner to stay on the engine. In all such cases it is elementary that it is for the jury and not the trial or appellate court to determine the existence or non-existence of contributory negligence.

There is nothing in the Federal Employers' Liability Act or in any decision of this or any court which changes the settled rule on this subject and takes from the jury the power

and duty of interpreting relevant evidence touching such questions or which permits a court to decide them as matter of law. Nor is there any modification of the ancient rule which requires railroad employees as well as other men to exercise ordinary care for their own safety at all times and under all conditions and that the failure so to do constitutes contributory negligence, regardless of the existence of negligence on the part of the defendant. Indeed, discussion of contributory negligence is pertinent only in the presence of negligence of the defendant. The term "contributory negligence" implies and presupposes the existence of negligence of the defendant.

Booth v. *McLean Contracting Co.*, 108 Md. 456, 70 Atl. 104
Dragan v. *Grossman*, 116 N. J. L. 182, 182 Atl. 848
Hummer's Ex'x v. *Louisville & N. R. Co.*, 128 Ky. 486, 108 S. W. 885

Bruner disregards this elementary principle in arguing over and over that Bruner's behavior was not contributory negligence; was not dangerous except for Colosimo's carelessness in moving the engines.

On page 24 Bruner calls to the court's attention cases involving assumption of risk in which it is stated this court has recognized the rights of employees of railroads to rely upon fellow employees exercising ordinary care and following customary methods in the performance of their work. Typical of the group of cases cited is *Chicago R. I. & P. Ry. Co.* v. *Ward*, in which it was held that Ward could not be regarded as having assumed the risk of a fellow employee failing to obey a rule or follow a custom. This, of course, is elementary in the law of assumption of risk. The other cases cited come no closer to supporting the contention of Bruner than does the Ward

case. It is also to be noted that in several of the cases cited in the first paragraph commencing on page 24 of Bruner's brief, statements by courts that plaintiffs could assume that rules and customs would be obeyed were made with relation to the defense of assumption of risk and were based upon the elementary principle that an employee does not assume the risk of violation by a fellow servant of a rule or custom.

(b) *Reply Brief regarding Instructions Nos. 9 and 20.*

On page 29 Bruner relies upon *State* v. *Trimble*, *Bucher* v. *Equitable Life Assurance Society* and *Barlow* v. *S. L. & U. R. Co.*

They merely announce well recognized principles that instructions must be considered as a whole; that portions of the charge may not be picked out for consideration; and that two instructions on the same subject are not erroneous unless contradictory. None of them upholds instructions such as Nos. 9 and 20, which purport to be all inclusive and which emphatically and repeatedly declare that if Bruner was injured as the result of the Railroad's negligence "he would be entitled to receive" damages which would fully compensate him, without any mention therein of deduction for contributory negligence.

REPLY BRIEF ON BRUNER'S POINT III

On page 31 of Bruner's brief the following statement appears:

> Petitioners have never contended that the issues of negligence and contributory negligence were not submitted to and determined by the jury.

A substantial portion of the Railroad's brief and Bruner's response thereto is devoted to a discussion of the Railroad's contention that it was not, *as matter of law guilty* of actionable

neglicence (negligence which was the proximate cause of the accident), and that Bruner was not, as *matter of law*, free from contributory negligence. Substantial portions of both briefs are devoted to a discussion of the Railroad's contention that the trial court and the Supreme Court of Utah, respectively, committed manifest error in depriving the Railroad of its right to have the jury find the facts under proper instructions and in holding as matter of law, that the Railroad was guilty of actionable negligence and that Bruner was not guilty of contributory negligence.

Bruner's argument on this point is based upon the fundamental fallacy that he cannot be regarded as guilty of contributory negligence because what he did would not have been dangerous except for Colosimo starting the engines without warning. This is fallacious because it is inconsistent with the entire doctrine of contributory negligence which presupposes primary negligence on the part of defendant concurring with contributory negligence on the part of plaintiff both as proximate causes. If either is not negligent or if either negligence is not a proximate cause, there is no room for the doctrine. It would be equally fallacious for the Railroad to argue that Colosimo's acts cannot be regarded as negligent because no damage would have occurred save for Bruner unnecessarily placing himself in a position which would be dangerous if the engines were started. Either contention fails to comprehend the doctrine of contributory negligence.

Thompson Commentaries on the Law of Negligence, Sec. 169 reads as follows:

> Contributory negligence, in a sound juridical sense, is the negligence of the plaintiff, or of the person on account of whose death or injury the action is brought, amounting to a want of ordinary care and proximately contributing to bring about the injury. The clear mod-

> ern doctrine is that, in order to constitute such negligence as will bar a recovery of damages, these two elements must in every case concur: 1. A want of ordinary care on the part of the plaintiff, or where the action is for damages resulting in death, a want of ordinary care on the part of the person killed; 2. A proximate connection between this want of ordinary care and the injury complained of.

This court as early as 1851 stated the law to be that one person being at fault will not dispose with another's using ordinary care for himself.

Williamson v. *Barrett*, 13 Howard 101. At page 109 the court said:

> * * * A man is not at liberty to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not use common and ordinary caution to avoid it. *One person being in fault will not dispense with another's using ordinary care for himself.*

Matthews v. *Daly West Mining Co.*, cited by Bruner on page 37 does not hold either that the employer in that case was guilty of negligence as matter of law or that the employee was as matter of law not guilty of contributory negligence. It merely upheld a jury's verdict in favor of the injured employee and held that motions for non-suit and directed verdict were properly denied. It would be an authority against the Railroad in this case only if the Railroad were contending that Bruner was *guilty of contributory negligence* as matter of law. It sheds no light on whether the Utah Supreme Court committed error in holding that Bruner was as matter of law *not guilty of contributory negligence.*

Throughout his brief Bruner contends that it is perfectly safe to cross over draw bars. But in *Lehigh Valley R. Co.* v. *Scanlon*, 259 Fed. 141, the Second C. C. A. upheld the District Court in leaving to the jury the question of whether a railroad was negligent in leaving cars in a position such that an employee, whose duty required him to cross that track, was under the necessity of climbing over the draw bars.

REPLY BRIEF ON BRUNER'S POINT IV

On page 43 Bruner states that the Railroad did not contend in the trial court that the rules pleaded were inapplicable. This is entirely incorrect. The Railroad has so contended throughout this case. Moreover, the Supreme Court of Utah said their applicability was doubtful. It is true that the Railroad admitted the existence of the rules but never their applicability.

On page 43 Bruner, in referring to the Railroad's contention that it could not be said as matter of law that Colosimo should have anticipated that Bruner would dismount from the engine and climb over the draw bars, says:

> "The proposition is entirely moot inasmuch as any question of negligence based on Colosimo's failure to anticipate what Respondent might or might not do was not pleaded by Respondent nor submitted to the jury by the trial court."

On page 44 Bruner says in part:

> "* * * the failure of Colosimo to anticipate the breach of said order, even if one had been given, did not in whole or in part cause the injuries sustained by Respondent and was never relied upon by Respondent, his counsel or the Supreme Court of Utah as a ground of negligence in this case."

Also on page 45 Bruner continues to disclose a curious misunderstanding of the Railroad's argument that the failure to guard against conduct not reasonably to be anticipated is not negligence. This argument is made on pages 29-32 of Petitioner's original brief. It is based on well recognized principles of the law of negligence. It is not at all dependent upon whether a plaintiff pleads it or relies on it. If Colosimo told Bruner to stay on 1182 and it was Bruner's duty to obey and Bruner did not tell Colosimo he was going to dismount, then Colosimo need not have anticipated that Bruner would dismount and any failure to guard against that possibility would not constitute negligence. Bruner's pleading cannot add to or detract from the Railroad's reliance on that principle of law.

Tennant v. *Peoria & Pekin Union R. Co.*, relied on by Bruner on page 47, also held that the issues of negligence and causation should have been submitted to the jury. It does not hold that either issue should have been determined as matter of law.

C. & O. Ry. Co. v. *Proffit*, relied on by Bruner on page 47, merely holds that an employee does not *assume the risk* of being subjected to unusual dangers not normally incident to the employment. The excerpt quoted on pages 47 and 48 was addressed to the defense of assumption of risk.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Utah should be reversed.

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